1994

Phoenix Indemnity Insurance v. Estate of Justin Bell : Reply Brief

Utah Court of Appeals

IN THE COURT OF APPEALS

STATE OF UTAH

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PHOENIX INDEMNITY INSURANCE COMPANY, Plaintiff/Appellant, vs. ESTATE OF JUSTIN BELL, deceased, by and through his Special Administrator, Defendant/Appellee.	:	Case No. 940151-CA REPLY BRIEF OF APPELLANT APPEAL from the Third District Court, Salt Lake County, Judge Timothy R. Hanson Priority No. 15

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> [T]he obligation is suspended pro tanto until the instrument is due or if it is payable on demand until its presentment. If the instrument is dishonored action may be maintained on either the instrument or the obligation.

2. Utah Code Ann. § 70A-2-511(3): "[P]ayment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment."

3. Utah Code Ann. § 31A-21-303(2)(c): "[C]ontract that has not been previously renewed if the contract has been in effect less than 60 days. . . . No cancellation under this subsection is effective until at least (10) days after the delivery to the insured of a written notice of cancellation."

4. Utah Code Ann. § 70A-3-310(2) and (2)(a):

> [I]f a note or an uncertified check is taken for an obligation, the obligation is suspended to the same extent the obligation would be discharged if an amount of money equal to the amount of the instrument were taken, and the following rules apply:
>
> > (a) In the case of an uncertified check, suspension of the obligation continues until dishonor of the check or until it is paid or certified.

STATEMENT OF ISSUES

Appellant seeks to clarify the statement of issues on appeal by stating that the only issue in this case is whether Mr. Bell had an insurance policy in full force and effect on August 11, 1991, in light of the fact that Phoenix Indemnity did not cancel the policy for non-payment of premium. Upon further review, it

appears that Appellant's statement of the issues merely refines Appellee's statement of the issues, by breaking Appellee's statement of the issue into workable issues of law, which are:

1. Whether acceptance of a check as payment is conditional, which condition is satisfied only when the check is honored at the bank upon which it is drawn.

2. Whether giving of a worthless check satisfies the condition precedent necessary to form an insurance contract.

3. Whether notice of cancellation is required when an insurance contract does not exist due to the fact that payment of the premium has not been made.

ARGUMENT

I.

PHOENIX INDEMNITY'S ARGUMENT THAT "ACCEPTANCE OF A CHECK AS PAYMENT IS CONDITIONAL, [WHICH] CONDITION IS SATISFIED ONLY IF THE CHECK IS HONORED AT THE BANK UPON WHICH IT IS DRAWN," WAS RAISED AT THE TRIAL LEVEL AND THEREFORE THIS ISSUE SHOULD NOT BE STRICKEN FROM THE COURT'S CONSIDERATION.

The Appellee incorrectly states that the matter of conditional payment was not raised at the trial level and therefore cannot be considered on appeal. While it is true that two Uniform Commercial Code provisions, Utah Code Annotated Sections 70A-2-511(3) (cited by Appellee as 70A-3-511(3)) and 70A-3-802(1)(b), were not cited at the trial level, Appellee has not cited any case law which sets forth that statutes or case law not cited at the trial level cannot be cited on appeal. (See Appellant's Brief p. 11.) Appellee

rather cites cases standing for the well known principle of law that issues not addressed at the trial level cannot be addressed for the first time on appeal. Phoenix Indemnity has not addressed an issue for the first time on appeal, but rather has buttressed its argument that in fact, acceptance of a check as payment is conditional, which condition is satisfied only if the check is honored at the bank upon which it is drawn.

Phoenix Indemnity first addressed the issue that their acceptance of Mr. Bell's worthless check was conditional upon its presentment and subsequent honor by his bank in their Motion for Summary Judgment. Phoenix Indemnity stated in their motion for summary judgment that "the premium payment [Mr. Bell] gave [was] a condition precedent to receiving insurance." R. 81. This point was subsequently argued by Appellee in its Reply Memorandum in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment. Appellee stated in this motion that there are exceptions to the general rule that "delivery of a check to an insurer and its acceptance thereof is not payment of the debt until the check itself has been paid." R. 127. Phoenix Indemnity addressed the issue again in its Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment and In Opposition to Defendant's Motion for Summary Judgment, wherein it stated that "acceptance of the premium check by the bank was a condition precedent to insurance coverage." R. 141. Based

on the foregoing it is evident that the matter of conditional payment was in fact raised at the trial level and therefore can be considered on appeal along with the case law, statutes and treatises cited in Appellant's brief which supports Appellant's argument.

II.

UTAH CODE ANNOTATED SECTION 31A-21-303 DOES NOT ADDRESS THE ISSUE OF CONDITIONAL PAYMENT WHICH UTAH CODE ANNOTATED SECTIONS 70A-2-511(3) AND 70A-3-802(1)(b) ADDRESS.

Appellee would like this court to only consider Utah Code Annotated Section 31A-21-303 when addressing all issues on appeal. However, that section only deals with cancellation of an insurance policy. It does not address the issue of conditional payment which Utah Code Annotated Sections 70A-2-511(3) and 70A-3-802(1)(b) address.

Appellee argues that statutes relating to a specific subject should be given preference over those dealing more generally with the subject. Appellant agrees. Utah Code Annotated Section 31A-21-303 does not address the issue of conditional payment. Utah Code Annotated Sections 70A-2-511(3) and 70A-3-802(1)(b) specifically addresses the issue of conditional payment. Therefore, according to Appellee's argument, Utah Code Annotated Sections 70A-2-511(3) and 70A-3-802(1)(b) should be given preference when dealing with the issue of conditional payment

because they relate specifically to the subject at issue. Utah Code Annotated Section 70A-3-802(1)(b) states:

> [T]he obligation is suspended pro tanto until the instrument is due or if it is payable on demand until its presentment. If the instrument is dishonored action may be maintained on either the instrument or the obligation.

In addition, Section 70A-2-511(3) states: "[P]ayment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment."

III.

PHOENIX INDEMNITY'S INSURANCE POLICY WAS CONDITIONAL UPON SUBSEQUENT HONOR OF MR. BELL'S PREMIUM PAYMENT.

The general rule of acceptance of a check as payment is that a check is conditionally accepted until it is properly presented and subsequently honored by the bank. See 14A Appleman, Insurance Law and Practice, § 8144, n. 53. See also Utah Code Annotated Section 70A-2-511(3) ("[P]ayment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment.") Appellee asserts that there are exceptions to the general rule, namely express or implied intentions. (Brief of Appellee, p. 13.)

Although Appellee cites Cullotta v. Kemper Corp., 87 Ill.2d 25, 397 N.E.2d 1372 (1979), in support of the above claimed exception to the general rule, Cullotta is distinguishable from the case at bar. In Cullotta neither the binder nor the insurance

policy contained any conditional language. The first conditional language ever used was in a letter sent to the insured notifying him that his check had been dishonored due to insufficient funds. In that letter, the insurer stated for the first time that "coverage under the policy was `contingent upon payment of the premium.'" Id. at 1374. In the case at bar, conditional language was used in both the binder and the insurance policy. Mr. Bell signed an application which stated that "if my premium is not honored by the bank, no coverage will be considered bound." [Emphasis added.] Further, the insurance policy issued to Mr. Bell stated on page 1, paragraph 1, that "We agree with you, in return for your premium payment, to insure you subject to all the terms of this policy." [Emphasis added.] Unlike Cullotta, Phoenix Indemnity's insurance policy contained conditional payment language in both the binder and insurance policy evidencing its intent that insurance coverage was conditional upon payment of his premium. In addition, Mr. Bell was on notice, long before Phoenix Indemnity notified him of his dishonored check, that if his premium payment was not honored by his bank that Phoenix Indemnity would not provide him with insurance coverage. Phoenix Indemnity's binder and policy language express its intentions regarding the conditional nature of their insurance coverage. Acceptance of Mr. Bell's check and obtaining Mr. Bell's signature on the binder stating that insurance coverage was conditional upon subsequent

honor of his check sufficiently evidences Phoenix Indemnity's intentions that insurance coverage was conditional.

In addition, Cullotta is again distinguishable from the case at bar inasmuch as Cullotta involved a renewal policy rather than issuance of a new policy. The case at bar deals with an initial insurance policy - not one already in force. Renewal of an insurance policy is significantly different than issuance of an initial insurance policy. Renewal extends the coverage of an existing insurance policy. Issuance of an initial insurance policy involves the completion of an application and binder before an insurance policy is issued. See Statewide Ins. Corp. v. Dewar, 143 Ariz. 553, 694 P.2d 1167 (1984). The insurance binder controls coverage issues before the policy is issued. The insurance binder is the insured's receipt and controls coverage issues. Once a policy is issued the policy controls the coverage issues.

Appellee also relies on Bartleman v. Humphrey, 441 S.W.2d 335 (Mo. 1969) in support of its position. Clarification of the facts in that case is needed inasmuch as Appellee's summary is incomplete and does not fully explain the facts which ultimately bear on Appellee's argument. In Bartleman, Mrs. Humphrey chose not to renew an existing insurance policy, but rather to arrange for a new policy with different coverage. The new policy was to provide coverage from November 29, 1960, through February 29, 1961. However, Mrs. Humphrey's bank did not honor her check due to

insufficient funds. Therefore, her check was returned and mailed to her on December 27, 1960, with a letter stating that "Since the check was not honored on presentation, the premium is not paid and your policy has lapsed or will lapse as of 10:00 A.M. on the date the premium was or is due," namely November 29, 1960. Thereafter, on January 6, 1961, Mrs. Humphrey mailed a money order to her insurance company. The money order arrived on January 9, 1961. The company accepted the money order as payment and the policy was reinstated "effective 1-9-61-9:A.M." Mr. Humphrey was involved in an automobile accident on January 9, 1961 at 6:10 a.m. When advised of the accident the insurer advised the Humphreys that their policy had lapsed on November 29, 1960, and was not reinstated until January 9, 1961, at 9:00 a.m., after the accident occurred. However, insurance records showed that the premium was paid prior to issuance of the insurance policy. The money order was considered as a cash payment. Thereafter, the court found that the premium payment had been paid at the time of the accident and that the policy was in effect at the time the accident occurred, even though the policy had not yet been issued.

Nonetheless, Appellee cites Bartleman for the contention that Phoenix Indemnity's insurance policy did not contain the conditional language required to defeat insurance coverage. However, the language in the Bartleman policy is different than that used in the Phoenix Indemnity insurance policy. The Phoenix

Indemnity policy states that: "We agree with you, in return for your premium payment, to insure you subject to all the terms of this policy." [Emphasis added.] An insurance policy is a contract. Without the condition precedent of consideration, it is well settle law that the contract is void. Bartleman at 342. Because Mr. Bell's insurance premium check was not honored by his bank, the contract which required payment of the same is void.

It was brought to Appellant's attention and is correct that Statewide Ins. Corp. v. Dewar, 143 Ariz. 576, 694 P.2d 1190 (1983) was vacated. Nonetheless, Statewide Ins. Corp. v. Dewar, 143 Ariz. 553, 694 P.2d 1167 (1984) does not support Appellee's position. In fact, unlike Appellee represents the facts, an insurance policy was not issued by the insurer. (See Brief of Appellee at p. 18.) The insurer only issued a binder. The binder did not contain any conditional payment language. The Supreme Court of Arizona therefore only reviewed the "narrow issue of whether a binder for automobile liability insurance covers the prospective insured for an accident occurring between the time coverage is bound and the application for insurance is rejected." Id. The court found Bartleman, supra, instructive and held that "the insurer has the right to treat the check as conditional payment" but that "once the insurer accepts the check without evidencing an intent to do so conditionally, it can no longer exercise its right to declare the policy lapsed due to nonpayment." The case at bar is factually

different, inasmuch as it does not deal with a binder (or an insurance policy) that is void of conditional language. As discussed above, both Phoenix Indemnity's binder and policy contained conditional language that conditioned coverage upon subsequent honor of Mr. Bell's check. Therefore, Phoenix Indemnity's intent is evident. Phoenix Indemnity intended to make insurance coverage conditional upon acceptance and subsequent honor of Mr. Bell's premium check by his bank.

Appellee seeks to distinguish Tallent v. Tennessee Farmers Mut. Ins., 785 S.W.2d 339 (Tenn. 1990), by stating that the insured never had sufficient funds in the bank to cover the check. (See Brief of Appellee at p. 19.) However, the case at bar is not much different than Tallent because Mr. Bell had sufficient funds on very few days after giving his worthless check. There is no cited case law which requires an insured to determine which day one has enough funds in his account and then present a check for payment on that day only. The fact that the insured in Tallent did not ever have sufficient funds in her bank only bolstered the court's determination that acceptance of a check is conditional until honored by the bank. Obviously, Mrs. Tallent's check would never have been honored by her bank. In Mr. Bell's case, there were very poor odds that presentment at any time would have been met with subsequent honor of Mr. Bell's check. Nonetheless, the court in Tallent found that acceptance of a check is conditional until

honored by the bank. Id. at 343. Likewise, Phoenix Indemnity is not liable for coverage because it is established law that acceptance of a check is conditional upon its subsequent honor by the bank.

Phoenix Indemnity demonstrated its intent both in its binder and insurance policy that coverage was conditioned upon subsequent honor of the premium payment check. In addition, legal principles show that the premium payments are conditional. Therefore, Mr. Bell did not have insurance coverage at the time of his accident. His failure to provide the necessary condition precedent negates insurance coverage.

IV.

PHOENIX INDEMNITY DID NOT WAIVE ITS RIGHT TO REFUSE INSURANCE COVERAGE TO MR. BELL AND IS THEREFORE NOT ESTOPPED FROM SO DOING.

Appellee contends that Appellant has by its own conduct either waived or is estopped from relying on the conditional payment rule. The general rule is that if a worthless check is given for the first premium, insurance coverage never goes into effect. See 14A Appleman, Insurance Law and Practice, § 8144 (1985).

In the case at bar, Mr. Bell signed an insurance application stating that he understood "that if my premium is not honored by the bank, no coverage will be considered bound." By this acknowledged statement alone it is clear that Phoenix Indemnity is and was not bound to provide insurance coverage to Mr. Bell because

acceptance of the premium check by the bank was a condition precedent to any insurance coverage. Zions Bank did not honor Mr. Bell's premium check and therefore Phoenix Indemnity was not bound to provide insurance coverage.

Even if Justin Bell had not acknowledged that insurance coverage was conditional upon the bank's acceptance of his premium check, the general rule is that "in the absence of an agreement to the contrary, the delivery of a check to an insurer and its acceptance thereof is not payment of the debt until the check itself has been paid." 14A Appleman, Insurance Law and Practice, § 8144 (1985). Mr. Bell did not have an agreement with Phoenix Indemnity that coverage would be provided before his check was honored. In fact, the policy that was issued before Phoenix Indemnity received notice of Justin Bell's dishonored check, states again that insurance coverage is conditional upon payment of Justin Bell's premium. On page 1, paragraph 1, of the issued policy, it states: "We agree with you, in return for your premium payment, to insure you subject to all the terms of this policy." (Emphasis added.) Appellee itself has admitted that "once Phoenix Indemnity issued the policy, its terms became controlling." R. 130. The conditional payment of Mr. Bell's premium was never made, and therefore Phoenix Indemnity did not agree to cover Justin Bell under the insurance policy.

This case at bar is similar to Tallent v. Tennessee Farmers Mut. Insurance, 785 S.W.2d 339, 343 (Tenn. 1990) wherein the insured issued a worthless check to renew an insurance policy. The policy that was being renewed included conditional language precisely the same as Phoenix Indemnity's policy: "We agree with you, in return for your premium payment, to provide insurance subject to all the terms of this policy." (Emphasis added.) The court found this language to constitute conditional language and the policy was not renewed because issuance of a worthless check is not considered payment for purposes of coverage by an insurance company. The same court also cites Appleman as saying: "If such a check is given for the first premium, that coverage never goes into effect." Id. at 343. See 14A Appleman, Insurance Law and Practice, § 8144 (1985). Like Tallent, Justin Bell gave a worthless check, not for renewal, but for the first premium. Because the check was dishonored upon presentment, no coverage was ever in effect.

The only way Mr. Bell could have obtained coverage was to have Phoenix Indemnity unconditionally accept his worthless check as a valid payment. Phoenix Indemnity did not unconditionally accept his check. Phoenix Indemnity included conditional language in both their application as well as their policy. Phoenix Indemnity did not waive its right to conditionally accept Justin Bell's check. Therefore, Phoenix Indemnity cannot be estopped from denying

insurance coverage to Justin Bell. "Estoppel occurs when the party claiming benefit of the doctrine has relied upon actions or representations of the other party which are inconsistent with the position taken by the other party at trial." Gurley v. State Farm Mutual Auto Insurance Co., 428 N.E.2d 916 (Ill. 1981). Phoenix Indemnity did not misrepresent its intentions of making acceptance of Justin Bell's payment as conditional. Both the application and policy used conditional language. Therefore, the doctrine of estoppel does not apply to the case at bar.

Appellee asserts the argument that Phoenix Indemnity should have, but did not resubmit Justin Bell's check for payment. The general rule is that an insurer is "not bound to return the check a second time for payment." 14A Appleman, Insurance Law and Practice, § 8144 (1985). Justin Bell might have had sufficient funds on very few days subsequent to the initial dishonor by Zions Bank. However, it is not an insurer's responsibility to determine which day is best to resubmit a check and therefore play a guessing game. The check was dishonored and therefore no payment was made, which leaves Justin Bell without insurance coverage.

Appellee also argues that Phoenix Indemnity's "notice of cancellation or non-renewal" implies that an insurance policy was in force and that Phoenix Indemnity was required to and did not comply with statutory notice requirements to cancel. As discussed above, not only was the application for coverage conditional, but

also the insurance policy itself due to the conditional language on the front page in the first paragraph. See Tallent at 339. What Phoenix Indemnity did was make a good faith effort to notify Mr. Bell that the policy was not in force and never went into force due to dishonor of his check for insufficient funds. It was not Phoenix Indemnity's intent to cancel a policy, rather it intended to notify Mr. Bell that he did not have any insurance coverage in force.

It is the intent of the parties that is controlling. Appellee cites Farmers and Merchants Bank v. Davis, 151 Ill. App. 3rd 929, 503 N.E.2d 565 (Ill. App. 2d D. 1987) cert. den., 571 N.E.2d 427 (1987), in support of its argument that Phoenix Indemnity waived its right to declare that the insurance policy was not in force. This case, however, is distinguishable from the case at bar. Unlike Farmers, wherein the insurer "waived its right to declare the policy lapsed for nonpayment of the premium" when the premium check was dishonored, Phoenix Indemnity's actions never expressly or impliedly waived its conditional acceptance of Justin Bell's premium check. By all of Phoenix Indemnity's acts, it is obvious that its intent was to make Mr. Bell's insurance coverage conditional upon acceptance of his check by Zions Bank. When Zions Bank did not honor Mr. Bell's check, Phoenix Indemnity intended to notify Mr. Bell of such and also to notify Mr. Bell that he did not have any insurance coverage. Therefore the "notice of cancellation

or non-renewal" cannot be construed to imply that coverage was in force.

Appellee also asserts that Phoenix Indemnity issued Mr. Bell an insurance policy after it knew his check was dishonored. This is an incorrect assumption of the facts. In fact, one department at Phoenix Indemnity received notice on July 29, 1991, that Justin Bell's check had been returned without payment. On the same date, another department sent a policy. Because departments perform different functions, there was not immediate notice to all departments at Phoenix Indemnity of Mr. Bell's dishonored check. Therefore, the sending of the policy was not done with notice of Justin Bell's dishonored check, which also shows that it was not Phoenix Indemnity's intent to issue a policy unconditionally.

Phoenix Indemnity agreed to provide insurance coverage to Mr. Bell upon the condition that his check was honored by Zions Bank. Mr. Bell's check was dishonored, and therefore no coverage was provided. Under this fact situation, the law of waiver and estoppel do not apply.

V.

CONSIDERATION, WHICH WAS A CONDITION PRECEDENT TO INSURANCE COVERAGE, WAS NOT RECEIVED.

Appellee cites 12 A.L.R.3d 1304, 1318 (1967) claiming that payment of a premium is not a prerequisite to insurance coverage. However, Appellee fails to distinguish between insurance binders and insurance policies. The law distinguishes between these two

types of insurance coverage. See Statewide Ins. Corp. v. Dewar, 143 Ariz. 553, 694 P.2d 1167 (1984). Case law dealing with insurance binders does not always apply to insurance policies. Id. Nonetheless, in Dewar at p. 1168, the court stated that "Neither the binder coverage nor the policy goes into effect until the payment required has actually been made." This court did require payment of the premium as a condition precedent to insurance coverage.

Appellee seeks to distinguish McCormick v. State Capital Life Ins. Co., 254 S.C. 544, 172 S.E.2d 308 (1980), from the case at bar. However, the cases are identical due to the fact that Phoenix Indemnity did not know that Mr. Bell's check was dishonored at the time it issued the insurance policy. Therefore, the court's ruling that "since the check for the payment of the first monthly premium was never paid, the insurance policy was never of any force or effect and afforded the applicant no coverage" still applies to the case at bar. Id.

While Appellee correctly states that opinion letters from the Attorney General are not controlling in the appellate courts of this state they do provide insight into the question that is directly at issue in this case and was provided to the court for that reason.

Appellee provides no case law that supports its argument that a promise to pay is sufficient consideration. In addition,

Appellee provides no case law that supports its argument that the dishonored check given to Phoenix Indemnity is the equivalent to a promise to pay. Argument without supporting case law is just that. Appellant has cited case law similar to the fact situation at issue which states that "[t]he mere giving or sending of a worthless check to the insurer does not affect the payment of a premium the result being, if such check is given for the first premium, that coverage never goes into effect . . . " See 14A Appleman § 8144, P. 176 (1985).

VI.

PHOENIX INDEMNITY WAS NOT BOUND TO CANCEL A POLICY THAT DID NOT EXIST IN ACCORDANCE WITH UTAH CODE ANNOTATED SECTION 31A-21-303.

Appellee states that the purpose of the notice requirements are to protect the insured. While this may be true, in the case at bar there is not an insured to protect. One does not become an insured until all the requirements of a contract have been met. Mr. Bell did not provide the consideration (payment of the premium) necessary to form a contract. Therefore, as more fully discussed above in Argument V, Mr. Bell did not become an insured because he did not provide the consideration necessary to form a contract.

While Appellee cites Godoy v. Farmers Ins. Group, 759 P.2d 1173 (Utah App. 1988), for the principle of law that notice of cancellation is required to cancel an insurance policy, this case can be distinguished from the case at bar. In addition, the

Appellee cites a statute in Godoy that has since been repealed to support its position. (See Utah Code Annotated § 31-41-16(1) (1974) (repealed). Nonetheless, in Godoy, Mr. Godoy was issued a six month insurance policy. He paid the insurance premium for the first six months. Thereafter he made a payment of twice the usual monthly amount so that he would have insurance coverage for two additional months. Thereafter no premium payments were made. The insurance company sent Mr. Godoy a notice of cancellation. After the termination date on the notice of cancellation, Mr. Godoy was involved in an accident. The court held, under the statute in effect at the time of the accident, Utah Code Annotated Section 31-41-14 (repealed), that the insurance company was required to write insurance policies for a term of not less than twelve months and therefore that Mr. Godoy was considered to have insurance coverage for a twelve month period. The insurance company could not terminate an insurance policy for nonpayment of a premium payment during the twelve month period when it was required to provide insurance coverage for not less than twelve months. While the new insurance code contains no similar provision, that was the holding of the court under the old statutory provision. The case at bar is not similar in any manner to the issue addressed in Godoy. The case at bar does not deal with the issue of the length of the insurance policy or the cited statutes that have since been repealed. Unlike the case at bar, Godoy dealt with an insurance

policy that had been issued. Godoy did not deal with an initial worthless premium check. Godoy is therefore inapplicable to the case at bar.

Appellee next cites Hagerl v. Auto Club Group Ins. Co., 157 Mich. App. 683, 403 N.W.2d 197 (1987), leave to appeal den., 428 Mich. 900 (1987) to support its position. Hagerl is also distinguishable from the case at bar. Hagerl deals with the renewal of an insurance policy rather that formation of an initial insurance policy. The renewal language in the Hagerl insurance policy states: "If we offer to renew this policy, and the Principal Named Insured declines, it will automatically terminate at the end of the policy term. Failure to pay the required renewal premium means that our offer to renew has been declined." Hagerl at 198. The court found that this language informed the insured that he or she is not bound to an unwanted contract when renewal notices are sent out. The renewal clause merely notified the insured that he or she did not have to take any affirmative action to forego renewal. The fact situation in the case at bar could not be more dissimilar than it is to Hagerl. The case at bar does not deal with a renewal policy or with similar policy language. The case at bar deals with an insurance contract that was never formed due to the fact that Mr. Bell did not provide the necessary consideration to form a contract.

In addition, unlike Appellee contends that Hagerl sets forth the principle that giving of a premium check evidences payment, giving of a premium check is not payment of a premium. The issue of payment is discussed more fully above and sets forth that acceptance of a premium check is conditional upon subsequent honor by the bank. (See Argument III.)

Neither of Appellee's cited cases supports its position. Neither case sets forth that an insurance company is bound to give notice of cancellation in the fact situation at issue in this case, where an insurance policy does not even exist. When an insurance policy does not exist it cannot be cancelled and therefore no notice of cancellation is required.

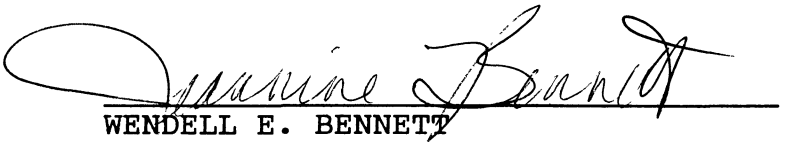
CONCLUSION

Mr. Bell signed an insurance application which stated that "if my premium is not honored by the bank, no coverage will be considered bound." [Emphasis added.] Further, the insurance policy issued to Mr. Bell stated on page 1, paragraph 1, that "We agree with you, in return for your premium payment, to insure you subject to all the terms of this policy." [Emphasis added.] Both the binder and the insurance policy contain language stating that insurance coverage in conditioned upon the premium payment being honored by the bank. This subsequent honor of the premium payment is the condition precedent to the formation of an insurance contract and therefore insurance coverage. Mr. Bell did not

provide the condition precedent and therefore no insurance coverage existed and the insurance policy at issue is void. Because insurance coverage does not exist, cancellation of a policy is impossible. One cannot cancel something that does not exist.

For the reasons stated above, Appellant urges this court to reverse the lower court's ruling and find that Mr. Bell did not have insurance coverage at the time of his accident due to his failure to provide the condition precedent to formation of a valid and binding insurance contract and therefore that Phoenix Indemnity was not required to provide any notice of cancellation.

DATED this 18 day of July, 1994.



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CERTIFICATE OF HAND DELIVERY

I hereby certify that this 18 day of July, 1994, I hand-delivered two copies of the foregoing REPLY BRIEF OF APPELLANT to the following:

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